

VIRGIN ISLANDS

**LABOUR CODE, 2010
(No. 4 of 2010)**

IN THE LABOUR ARBITRATION TRIBUNAL

Case No. BVILAT2023/021

BETWEEN

ST CLAIR M LEWIS

COMPLAINANT

AND

GEORGE TURNBULL CONSTRUCTION

RESPONDENT

REASONS FOR DECISION

BEFORE: **Samuel Jack Husbands**, Chairperson, and **Zebalon McLean**, Arbitrator

TRIAL ON: The 26th day of April and the 2nd day of May 2024

MADE ON: The 10th day of May 2024

IN ATTENDANCE: (1) St Clair. M Lewis, the Complainant

ADDITIONALLY: (3) Malisa Ragnauth-Mangal, as Secretary to the Tribunal

1. The Respondent has not participated in these proceedings and has not recommended the appointment of an arbitrator. He carries out a construction business. His trade licence for 2024 was admitted into evidence. It shows him as licensed to do business as “George Turnbull Construction Services”. He employed the Complainant as a mason and general artisan from about April or May 2013 to about 18 October 2021. Employers in the BVI are required to deduct from wages and pay certain employees’ statutory contributions or assessments, as the case may be, to the Social Security Board, the Inland Revenue Department and the National Health Insurance scheme (NHI). Employers must also pay their own portions of these contributions and assessments to the agencies.
2. The Complainant gave oral evidence and he also relied on his witness statement served with his Dispute Claim Form. He requires a work permit to work in the BVI. It is a notorious

fact or a clear and well-known law and policy that permits are renewable annually and that in order to obtain a renewal applicants must produce to the Immigration Department or Labour Department a certificate of good standing confirming their and the employer's contributions and assessments are up to date. The Complainant discovered in about October 2020 that his contributions and assessments and the employer's matching share had not been paid up. He notified the Respondent. He repeatedly visited the agencies trying to speed up the process of payment of contributions and assessments but the arrears were not brought up to date until May 2021 when he was able to get a renewal of his work permit. Because so much time had elapsed, he was only granted a renewal until June 2021.

3. He again contacted the Respondent and asked that his contributions be brought up to date. In September 2021 the Respondent told him he was coming out of business and ceasing operations but his son's company and another company would taking some of the employees. His son is George Turnbull Junior. He is called Junior. The Complainant suggested a meeting with the workers.
4. Near the end of October 2021, the Complainant and other workers met with the Respondent. They asked him about the status of their employment, about not having had an official meeting, and what plans Junior had for them, and about the next steps. They also made mention of severance pay and unpaid vacation pay. The Respondent said he owes them nothing. He added that their weekly salary is all that is due.
5. The Respondent never told the Complainant he was fired but from the meeting the Complainant took it that the Respondent had dismissed him. On the Sunday after the meeting the Respondent telephoned the Complainant and said he had no work for him. The Complainant returned to the Labour Department the next day, on Monday. This must have been 18 October. He saw Ms Toussaint, an officer at the Labour Department. Ms Toussaint telephoned the Respondent in his presence. She asked him if he was going to renew the Complainant's permit. He did not answer. She asked the Respondent if he would give the Complainant a release letter (a letter enabling a foreign employee to seek other employment). The Respondent replied that if the Complainant wanted anything he had to write a letter, presumably to him the Respondent. The Complainant never heard from him again.
6. It is not clear from the evidence if the Complainant worked between March and 18 October 2021. Around October 2021, Junior brought NHI forms for him to fill out. Junior said he was going to take over the workers. The Complainant did not take the forms.
7. The Complainant filed the Dispute Claim Form on 19 or 20 October 2021. As far as the Complainant is aware, the Respondent is still in business.
8. The Complainant could not work in the meantime without a work permit. It took him about a year to get another permit and a new job. In that year, he looked for work but did not receive any job offers. After over a year he found a new sponsor and was able to get a work permit.

9. The Complainant placed in evidence pay slips from 2014 to October 2021. They are at Exhibit SL2. His last wages were \$120 per day or \$600 per week for 5-day weeks. Sometimes he worked on Saturdays and Sundays

Findings

10. There is no dispute that the Respondent failed to pay the statutory deductions on a timely basis and failed to provide work for the Complainant. The Respondent's attitude seems to be that he was making no effort to retain the Complainant on staff or formally terminate him. In their conversation on 18 October 2021, or during the week before, the Respondent made it quite clear, without using the words "fired" or "dismissed" that the Complainant's contract had come to an end and he was being terminated. The Complainant could probably have repudiated the contract of employment and treat the week after the last date for which he received salary in March 2021 as his date of dismissal. But he was patient with the Respondent until he finally accepted in October that there would be no future for him in the employment of the Respondent.
11. There is no evidence that the Complainant was dismissed because of redundancy under section 89(2) of the Labour Code 2010 (**the Code**). There was no notice of dismissal and no evidence that the employer addressed his mind to any of the considerations in section 89(3) of the Code. The Complainant may have been constructively dismissed by reason of the Respondent's failure to pay his statutory deductions on a time basis or to provide work. We think the Complainant has satisfied the burden of proof imposed on him by section 85(2) of the Code. There can be no doubt that the Respondent's conduct made it unreasonable to expect the Complainant to continue the employment contract or that it was reasonable for the Complainant not to give notice.
12. Having found that the Complainant was constructively dismissed we apply the presumption in section 83(2) of the Code and conclude that the dismissal must have been unfair. Even if we did not find constructive dismissal and it could be argued that the Respondent's words to the Complainant amounted to words of dismissal, the onus would have been on the Respondent to prove the reason for the dismissal – see section 85(1).
13. There is one other point regarding the way the employment contract came to an end. It is not doubted that the Complainant's continued employment was subject to his obtaining a work permit each year. It must have been an implied term of the contract that the Respondent would have kept his statutory deductions current by remitting them promptly to the relevant agencies or departments and that the employer would assist in the renewal of work permits by cooperating with the Labour Department and the Immigration Department and providing the information usually asked for. The Respondent has failed to do this and has not provided any explanation. We do not think, therefore, that for the purposes of the assessment of compensation it would be reasonable to conclude that the employment had a limit of one year.

Remedies

14. Under section 86(1) of the Code the Tribunal may order reinstatement or re-engagement or may award compensation. Perhaps what was intended was that the Tribunal could order reinstatement or re-engagement if these orders were acceptable to both parties, and if not, compensation and, in a proper case, punitive damages. It does seem unlikely that almost entirely unrestricted punitive damages could be an alternative to compensation which is capable of quantification or estimation. In addition, punitive sums are most difficult to assess and impossible to justify, reasons why it is considered an exceptional remedy. The Complainant has no interest in reinstatement or re-engagement and neither does the Respondent, it would appear. The Complainant is seeking compensation. The Respondent while not appearing, had in statements to the Complainant treated the issue as one of compensation also.
15. The Complainant's last wages were \$600.00 per week. This is established by the latest wages slip dated 18 March 2021. There is no evidence of actual work done or wages paid after that date. The Complainant worked with the Respondent for at least 8 years. He was entitled to at least one month's notice of termination. It took him about at least a year to find a job. The Respondent must have made the search for employment more difficult by the refusal to issue a clearance letter. Considering the above factors and guided by section 86(2) of the Code we award the Complainant compensation assessed as follows:
 - a. one month's wages or \$2,400.00 he would have earned during the notice period pursuant to section 90(1)(b) of the Code, and
 - b. \$9,600.00 loss of wages for 4 months after the dismissal.
16. We will also award the Complainant interest at 3% per annum on the total sum of \$12,000.00 from 14 November 2021 until the date of this decision.

Summary of order

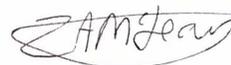
17. The following orders are made:
 - a. the Respondent shall pay the Complainant compensation of \$12,000.00,
 - b. the above sum shall carry interest at the rate of 3 per cent per annum from 14 November 2021 until the date of this award,
 - c. no costs are awarded.

By Order

Labour Arbitration Tribunal



Samuel Jack Husbands
Chairperson



Zebalon McLean
Arbitrator